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9
10 UNITED STATES DISTRICT COURT
11
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13
14 SAN FRANCISCO DIVISION

15 HARMEET K. DHILLON, an individual,

16 Plaintiff,

17 vs.

18 DOE 1, an unknown individual, and DOES 2
through 10,

Defendants.

Case No. 13-cv-01465 SI

DEFENDANT DOE 1'S REPLY BRIEF IN
SUPPORT OF MOTION FOR JUDGMENT ON
THE PLEADINGS PURSUANT TO FRCP 12(C)
OR IN THE ALTERNATIVE SUMMARY
JUDGMENT

Date: February 28, 2014
Time: 9:00 a.m.
Courtroom 10, 19th Floor
Hon. Susan Illston

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1 **I. INTRODUCTION AND STATEMENT OF ISSUES**

2 Courtrooms and lawsuits exist as the means of resolving legitimate disputes between good
 3 faith litigants, and not as cudgels to beat down the voices of political critics and commentary. In
 4 this case, the opposition brief filed by plaintiff Harmeet Dhillon (“Dhillon”) confirms defendant
 5 Doe 1’s most grave concern: Dhillon and her billionaire benefactor, Charles Munger, Jr., are using
 6 her law firm’s resources and his enormous wealth to crush legitimate political speech. Both of them
 7 are the subjects of highly critical articles published by The Munger Games. They want to silence
 8 that voice.

9 Until now, Dhillon and Munger had not found a strategy to mute The Munger
 10 Games. However, through the artifice of this lawsuit, they believe they can conduct intrusive
 11 discovery into The Munger Games’ identity, status, communications and relationships. Dhillon’s
 12 opposition brief confirmed that she is looking for a way to be as destructive to The Munger Games
 13 as possible. She now wants to exploit the fact that other media outlets, political blogs and websites,
 14 including the widely-read site “The Flash Report”, have written articles about this lawsuit and The
 15 Munger Games’ efforts to engage in political speech. Using the classic 1950’s tactic of whipping
 16 up accusations about associations, Dhillon now accuses The Munger Games of being part of some
 17 under-the-table conspiracy with the other media outlets that have picked up this story.

18 Dhillon obviously is trying to set the stage to serve subpoenas and other harassing discovery
 19 regarding The Flash Report and any other political website that is critical of Dhillon and Munger,
 20 all under the guise of proving that The Munger Games derives some sort of financial compensation
 21 from its reporting and political commentary. That is dangerous, chilling conduct in harsh violation
 22 of the First Amendment. The Munger Games has the right to engage in political speech especially
 23 when public figures like Dhillon and Munger are abusing their positions for personal
 24 gain. Similarly, concerned citizens of California and elsewhere have the First Amendment right to
 25 receive the information printed by The Munger Games, The Flash Report, and every other media
 26 outlet that writes about this case.

1 Dhillon and Munger, in contrast, do not have the right to engage in a wildly-speculative
 2 witch-hunt over a \$250 copyright infringement case. They have no right to utilize the discovery
 3 process to target and silence their critics. Using their logic of having the right to prove a “linkage”
 4 between The Munger Games and any media source that reports on this story, Dhillon and Munger
 5 would necessarily claim entitlement to investigate a link between The Munger Games and the San
 6 Francisco Chronicle, which ran a lengthy story about this case last December, or the Orange County
 7 Register, which republished the Chronicle story, or Thomson Reuters, which ran an article about
 8 this case on January 24, 2014.

9 The simple truth about this case is that Dhillon and Munger simply do not like what is being
 10 written about them, and they are searching for some way, anyway, to stop The Munger
 11 Games. Dhillon and Munger believe that pursing this federal copyright lawsuit for \$250 in
 12 damages is their best strategy, because they believe they can bury The Munger Games in attorney’s
 13 fees, learn private and potentially privileged or shielded information through discovery, scare away
 14 other journalists and critics, and then walk away with the smug satisfaction of having silenced the
 15 voices of their critics with the aid of this Court.

16 Despite all of Dhillon’s rhetoric, this case comes down to a simple analysis for the
 17 Court: when The Munger Games published the “Meet Harmeeet” article and its accompanying
 18 photograph, was the use of the photograph protected by the First Amendment and the fair use
 19 doctrine? The Court has all the information necessary to make that determination, in the same way
 20 that this Court resolved the Rule 12(c) motion in Savage v. Council on Am.-Islamic Relations, Inc. ,
 21 2008 WL 2951281 (N.D.Cal. July 25, 2008) and the United States Court of Appeals for the Second
 22 Circuit did a week ago when it granted summary judgment *sua sponte* in Swatch Group
 23 Management Services Ltd. v. Bloomberg L.P., 2014 WL 274407 (January 27, 2014).

24 **II. DHILLON OFFERED CONCLUSORY SPECULATION IN AN INSUFFICIENT**
25 EFFORT TO RAISE GENUINE ISSUES OF MATERIAL FACT

26 Dhillon does not deny that it is appropriate for this Court to grant a Rule 12(c) or summary
 27 judgment motion in a copyright infringement case where the defendant establishes that the claim is
 28

1 barred as a matter of law by the fair use doctrine. (Opp:7:6-8)¹ Instead, she mistakenly contends
 2 there are triable issue of *material* fact regarding each of the four fair use factors (17 U.S.C. § 107)
 3 which prevent this Court from entering judgment. (*Id.*)

4 However, all she offered in support of her opposition is pure speculation. The argument
 5 contained in her opposition brief simply is not evidence, and as set forth in the evidentiary
 6 objections section herein, the supporting declarations she filed are substantially objectionable.

7 It is well-settled that pure speculation and unsupported assertions will not suffice to create
 8 genuine issues of material fact for summary judgment purposes. Barsamian v. City of Kingsburg,
 9 597 F.Supp.2d 1054, 1062 (E.D. Cal. 2009); Rodden v. Jefferson Pilot Financial Ins. Co., 591
 10 F.Supp.2d 1113, 1123 (N.D. Cal. 2008) (“Conclusory, speculative testimony in affidavits and
 11 moving papers is insufficient to raise genuine issues of fact and defeat summary judgment.”)

12 As demonstrated herein and in Doe 1’s original brief, there are no *material* facts at issue.
 13 Even if there were, when all inferences reasonably drawn from those facts are construed in
 14 Dhillon’s favor, Doe 1 remains entitled to judgment as a matter of law. Neither the use of the
 15 photograph² nor the fact that the accompanying “Meet Harmeet” article is pure political speech, are
 16 disputed. The Court needs no other evidence. Contrary to Dhillon’s suggestion otherwise, “judges
 17 are not required to leave their common sense at the door when they take the bench each morning.”
 18 Schmidt v. Safeway, Inc., 894 F.Supp. 991, 1000 (D.Or. 1994).

19 This case is nothing but a power play by a billionaire political activist and his closely-allied
 20 attorney to squelch the First Amendment rights of someone who publically and repeatedly objects
 21 to their brand of money politics. *See, Doe v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088, 1092-93
 22 (W.D. Wash. 2001) (“When speech touches on matters of public political life, such as debate over
 23 the qualifications of candidates, discussion of governmental or political affairs, discussion of

24 _____
 25 ¹ All references to Dhillon’s Opposition Brief shall be in the following format: Opp:Page:Line(s).

26 ² While Doe 1 did not base either of his motions on Dhillon’s flawed claim that she has always, or at least during all
 27 material times, owned the photograph and the copyright, Doe 1 disputes these representations. Conspicuously, she
 never attached the supposed Copyright Assignment Agreement to her complaint or to any filing with this Court. None
 of these issues must be raised or resolved regarding the establishment of the Fair Use Doctrine. Should this case survive
 the current motions, Doe 1 will pursue the ownership and copyright issues.

1 political campaigns, and advocacy of controversial points of view, such speech has been described
 2 as the “core” or “essence” of the First Amendment.”) Balancing the four statutory fair use factors
 3 in light of both the undisputed facts of this case and those inferences, if any, of *material* fact that
 4 must be drawn in Dhillon’s favor, Doe 1 has clearly proven he is entitled to the protection embodied
 5 in the fair use doctrine, and judgment should be entered in his favor.

6 **III. DOE 1 IS ENTITLED TO A FAVORABLE FINDING ON THE “PURPOSE
 7 AND CHARACTER OF USE” FACTOR**

8 **A. Doe 1’s Work Was Clearly Transformative.**

9 Dhillon argues that there can be no fair use because Doe 1 did not alter the subject
 10 photograph and the photograph was supposedly used for the same *exact* purpose, i.e., that of
 11 identifying Dhillon. (Opp:17:4-12) Dhillon’s arguments are misplaced.

12 The question of fair use does not turn simply on whether the photograph itself was
 13 unaltered. Rather, the salient inquiry is whether the use of the photo, *in the specific context used*,
 14 was transformative. Sedgwick Claims Management Services, Inc. v. Delsman, 2009 WL 2157573
 15 (N.D. Cal. 2009) (emphasis added), aff’d, 422 Fed.Appx. 651 (9th Cir. 2011), *citing*, Perfect 10, Inc.
 16 v. Amazon.com, Inc., 508 F.3d 1146. 1164 (9th Cir. 2007). “A work is transformative when the new
 17 work does not merely supersede the objects of the original creation but rather adds something new,
 18 with a further purpose or different character, altering the first with new expression, meaning, or
 19 **message.**” (Emphasis added) Id. The more transformative the new work, the less the significance
 20 of other factors that weigh against fair use, such as use of a commercial nature. Campbell v. Acuff-
 21 Rose Music, Inc., 510 U.S. 569, 579 (1994).

22 In both her Complaint and in her own declaration, Dhillon states that she personally
 23 commissioned the photograph for the purpose of identifying herself as a candidate the California
 24 State Assembly, District 13 in 2008. (Complaint:¶14; Dhillon Dec:2:2-3) In his declaration,
 25 photographer Colin Hussey states that in creating the photograph, he was attempting to capture
 26 Dhillon in (1) an aesthetically pleasing manner; (2) that would allow her intended audience to
 27
 28

1 identify her; and (3) to convey the message that she was professional; intelligent and
 2 compassionate. (Hussey Dec:2:3-5 and 12-16).

3 In sharp contrast, Doe 1's use of the photograph was not to identify Dhillon as a candidate
 4 for public office or to assist her in being elected to the State Assembly. Quite differently, the "Meet
 5 Harmeet" article informed California citizens and voters that Dhillon, a Vice Chairman of the
 6 California Republican Party, was working for and being paid by billionaire activist Munger. The
 7 article emphasized Dhillon's boasts about her work with the ACLU, and her push for social issues
 8 that are directly opposed to issues advanced by the Republican Party, such as removing "Under
 9 God" from the Pledge of Allegiance and opposing anti-pornography filters on public library
 10 computers. These critical facts and Dhillon's necessary ethical dilemma are something that no
 11 other media outlets had previously reported. The Munger Games' commentary and dissemination
 12 of information lies at the heart of the First Amendment and the fair use doctrine.

13 **B. Dhillon Tries To Invent An Argument That The Munger Games Has Some
 14 Unknown And Unseen Commercial Benefit From The Site.**

15 In another attempt to have this Court leave common sense at the door, Dhillon tries to wish
 16 away the obvious fact that The Munger Games is not a commercial website. As Doe 1 has said
 17 consistently, a simple view of the website shows that it is free and accessible to all, it does not
 18 charge any money for anything, it does not sell anything, and has no place to pay, provide or donate
 19 money. There are no advertisements, the site has no section for subscriber-only content, and there
 20 is not a single link for political fundraising. By all appearances, the site and its content, including
 21 the article and its accompanying photograph, are totally free to all consumers and no money is
 22 solicited or generated by its viewers.

23 Dhillon refuses to acknowledge that obvious truth. Instead, she simply asserts the use of the
 24 photograph was "commercial" and therefore by definition "unfair". (Opp:11:7-8) Her problem is
 25 that she has absolutely no factual or legal support for that invented claim.

26 Dhillon's pure speculation is not evidence. The "Meet Harmeet" article is before this Court
 27 with no objection from either party. Dhillon did not point to any part of the article or of the entire
 28

1 The Munger Games website to establish that either is “commercial” or intended to generate
 2 revenue, much less a profit.

3 As noted above, pure speculation and unsupported assertions *will not suffice to create*
 4 *genuine issues of material fact for summary judgment purposes.* Barsamian, supra, 597 F.Supp.2d
 5 at 1062. Here, Dhillon tries to create issues of material fact where none exist by **speculating**:
 6 (1) That other individuals were involved in the authoring and/or publishing of the article, and they
 7 “may have profited” from their involvement (Opp:11:22-24); (2) The use of the photograph
 8 “likely” increased traffic to the Mungergames.net website and therefore “likely” increased Doe 1’s
 9 ability to demand higher compensation for future articles (Opp:13:4-8); (3) The Mungergames.net
 10 website “may” generate revenue from selling access to the site or having pay-per-click advertising
 11 (Opp:13:16-19); (4) Third party websites that link to the article may themselves generate revenue
 12 by ads on *their* websites (Opp:14:3-7); and (5) The Mungergames.net website operates “in an
 13 attempt to influence campaign contributions.” (Opp:14:19-20).

14 Taken to its logically extreme, the *content* of every website ever hosted or developed by
 15 third party vendors would have to be characterized as commercial, for these companies are typically
 16 paid for their services. Similarly, all content of any site would have to be deemed commercial if a
 17 third-party “linked” to the article and the third-party site has advertising or generates revenue.

18 Dhillon’s arguments are frivolous. The nature of political speech and commentary certainly
 19 do not change merely because it the speech is republished or “linked to” by a third-party
 20 commercial vendor. In this case, the “Meet Harmeeet” article and this resulting lawsuit have been
 21 picked up by such major news organizations as the San Francisco Chronicle, the Orange County
 22 Register and Reuters news service. Google has the “Meet Harmeeet” article linked as its first result
 23 for the search of “Meet Harmeeet”, and the Flash Report refers to portions of the article and then
 24 links to the entire article on The Munger Games. The fact that the San Francisco Chronicle is a
 25 commercial venture, or that the Flash Report supposedly has some commercial components to its
 26 website have absolutely no effect on The Munger Games and the Fair Use Doctrine analysis.

1 The Fair Use Doctrine analysis would not be substantially different even if The Munger
 2 Games were clearly and fully commercial. The Supreme Court noted in *Campbell* that even works
 3 involving comment and criticism “are generally conducted for profit in this country.” *Id.* (quoting
 4 Harper & Row v. Nation Enterprises, 471 U.S. 539, 592, 105 S.Ct. 2218); Mattel, Inc. v. Walking
 5 Mountain Productions, 353 F.3d 792, 803 (9th Cir. 2003). In Swatch Group Management Services
 6 Ltd. v. Bloomberg L.P., 2014 WL 274407, *7 (2d Cir., Jan. 27, 2014, 12-2412-CV), the Second
 7 Circuit stated last week that:

8 “almost all newspapers, books and magazines are published by commercial
 9 enterprises that seek a profit, and have discounted this consideration where “the
 10 link between the defendant’s commercial gain and its copying is attenuated” such
 11 that it would be misleading to characterize the use as ‘commercial exploitation.’”
 (Citations omitted)

12 Swatch at *7³.

13 This Court recognized in Savage v. Council on American-Islamic Relations, Inc., 2008 WL
 14 2951281, *5 (N.D. Cal., July 25, 2008, C 07-6076 SI) that the mere fact there is an exchange of
 15 money does not vitiate the Fair Use Doctrine:

16 “Protection under the doctrine of fair use extends to those with a political purpose,
 17 even those engaged in fundraising activities. Thus plaintiff’s allegation that
 18 defendants placed the link to the plaintiff’s audio excerpt near a donate button on
 19 defendants’ web page does not vitiate fair use, where defendants’ use of the audio
 20 excerpt called attention to plaintiff’s statements to raise funds from defendants’
 21 supporters, by providing criticism and comment.”

22 Citing, Hustler Magazine Inc. v. Moral Majority Inc., 796 F.2d 1148, 1152-3 (9th Cir. 1986);
 23 Campbell, 510 U.S. at 571-72.

24 In sum, there is no actual “material factual dispute” regarding any commercial component of
 25 The Munger Games. The entire argument is nothing more than a wild speculative claim by Dhillon
 26 as she hopes to defeat the motion. Even resolving any actual material factual disputes in Dhillon’s
 27

28 ³ Swatch is a highly instructive and relevant case that was decided just last week by the Second
 29 Circuit. Because of space limitations, Doe 1 is not able to recite and analyze Swatch. Doe 1 urges
 30 the Court to review it carefully. For the Court’s convenience, Doe 1 attaches a copy of the case to
 31 the concurrently-filed Declaration of Rick A. Cigel.

1 favor, it is clear that Doe 1's overriding purpose was not to supplant Dhillon's use of the
 2 photograph, but rather to deliver news and political commentary on Dhillon and Munger, and on the
 3 influence that Munger and his money bring to California politics. This kind of news reporting and
 4 commentary lie at the heart of the First Amendment and the Fair Use Doctrine. The "purpose and
 5 character of use factor" **overwhelmingly** weighs in favor of fair use, and this Court should so find
 6 and dismiss the instant action.

7 **IV. DHILLON READILY ADMITS THAT THE SUBJECT PHOTO WAS WIDELY**
 8 **DISSEMINATED IN 2008 IN CONNECTION WITH HER FAILED BID FOR THE**
 9 **CALIFORNIA STATE ASSEMBLY. THE FACT THAT SHE HAD ALREADY**
 10 **USED THE PHOTO BOLSTERS DOE 1'S PROTECTION BY THE FIRST**
 11 **AMENDMENT AND THE FAIR USE DOCTRINE.**

12 The "nature of the copyrighted work" factor is typically *insignificant* in the overall
 13 balancing of the fair use factors. Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc. (9th Cir.
 14 1997) 109 F.3d 1394, 1402. **This is particularly true when dealing with transformative uses,**
 15 **and where the work has been previously published.** Shepard v. Miler (E.D. Cal., Dec. 15, 2010,
 16 CIV 2101863WBSJFM) 2010 WL 5205108, *5, citing, Mattel, *supra*, 353 F.3d at 803.

17 Here, as a matter of law, Dhillon's copyright claim is "thin" because she widely used the
 18 photograph previously. Swatch, *supra* at *8. The scope of fair use is greater with factual than non-
 19 factual works. *Id.* at *13.

20 Dhillon freely admits that she used the headshot publicity photo as part of her 2008
 21 candidacy for the California State Assembly. She also used the photograph "in connection with her
 22 subsequent campaigns, political activities, and various professional marketing efforts", and she
 23 released the photo to other individuals and entities. (Complaint, ¶14; Dhillon Dec: 2:1-4 and 9-10;
 24 Opp:19:13-15). Her "subsequent campaigns" included her 2012 campaign for the position of
 25 Member of the California State Senate, District 11. (Complaint, ¶8) Her "political activities"
 26 include her successful campaigns for Vice Chairman of the California Republican Party for the
 27 2013-15 term and Chairman of the San Francisco Republican Party. (Complaint, ¶9)

1 While the photographer now claims to have made some “artistic decisions” in the use of
 2 shadow and light, his overriding admitted mission was to get people to vote for Dhillon by
 3 portraying her as a professional, intelligent and compassionate candidate for the State Assembly.
 4 (Hussey Dec:2:3-5 and 12-16). As detailed above, this was not Doe 1’s intent in utilizing the photo.

5 Additionally, and perhaps more importantly in this particular case, Dhillon first publicly
 6 disseminated the photo approximately five years before it appeared on The Munger Games website
 7 and did so in connection with a *public* campaign to win a California State Assembly seat.
 8 (Complaint:¶14; Dhillon Dec:2:2-3) It is clear that Dhillon was not deprived of the ability to control
 9 the work’s first public appearance, including when, where, and in what form it first appeared.⁴ *See*,
 10 Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 564 (1985), Accord, Swatch at
 11 *11. While neither as strong nor as important as the first factor, the “nature of the copyrighted
 12 work” factor also weighs in Doe 1’s favor, or at worst, is a neutral factor⁵.

13 **V. IN A VERY CONSPICUOUS AND TACTICAL MOVE, DHILLON NEITHER**
 14 **ALLEGED NOR ARGUED THAT THERE IS A COMMERCIAL MARKET FOR**
 15 **HER FIVE YEAR OLD HEADSHOT PHOTOGRAPH, AND SHE CERTAINLY**
 16 **FAILED TO ESTABLISH A TRIABLE ISSUE OF FACT REGARDING ANY**
 17 **IMPACT ON THAT NON-EXISTENT MARKET**

18 The last factor to be considered in analyzing the fair use doctrine is “the effect of the use
 19 upon the potential market for or value of the copyrighted work.” 17 U.S.C. 107(4). This factor
 20 “requires courts to consider not only the extent of market harm caused by the particular actions of
 21 the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in

22
 23
 24 4 Also relevant to this factor is Dhillon’s own statement in a previous brief to this Court that Doe 1
 25 “cut-and-pasted the Headshot Photograph ‘from a previous [Dhillon] political campaign’ website”.
 26 (Dkt. 39 at p. 3).

27 5 Both parties agree that the third factor in the fair use analysis, “Amount And Substantiality Of
 28 Portion Used” is neutral and does not favor or disfavor a finding of fair use. (Motion:20:21 to 21:5;
 Opp:19:20-26) Consequently, the factor is not discussed here.

1 by the defendant would result in a substantially adverse impact on the potential market for the
 2 original.” Campbell, 510 U.S. at 590 (quotation marks and alterations omitted).

3 While reviewing this factor, Doe 1 studied Dhillon’s complaint and her arguments and
 4 declarations in this case. Dhillon certainly is familiar with this factor, as she professes her
 5 “expertise” in copyright law. As an “expert” in the law, she certainly knows the difference between
 6 having a market for commercial use of her photograph, and merely allowing people to “use” the
 7 picture. She hoped to conflate those two fundamentally different concepts in her carefully worded
 8 allegations and statements in this case.

9 In Paragraph 14 of her Complaint, she did not allege that she ever licensed the photo or had
 10 a market for it. She merely claimed that she “used” the photograph for the campaign and
 11 subsequent campaigns, and in political activities and professional marketing efforts. The subject
 12 photograph is just one of many she had taken over the years, as Dhillon alleged in Paragraph 10 that
 13 she “frequently” commissioned “photography in connection with her political participation, law
 14 practice, and campaign activities.”

15 In her Declaration, Dhillon writes,

16 4. I have used the Headshot Photograph for the purpose of identifying myself
 17 to the public, including in connection with my political activities and in
 18 professional marketing efforts relating to my law firm, beginning in or around
 19 June 2008. Since that time, and until the infringing conduct that is the subject of
 20 this lawsuit, I have given authorization to a select and restricted few individuals
 and entities to use the Headshot Photograph, upon their specific request for my
 permission. At all times, I have carefully restricted the individuals and entities to
 whom I have granted authorization to use the Headshot Photograph.

21 5. Prior to Doe 1’s use of the Headshot Photograph on the munergames.net
 22 blog, I was frequently approached by individuals and entities for authorization to
 23 use the Headshot Photograph, and I selectively granted my authorization on a
 case-by-case basis.

24 6. Since the unauthorized and negative use of my Headshot Photograph on
 25 munergames.net in February 2013, I have not received any interest from third
 26 parties in using the Headshot Photograph.

27 (Dhillon Dec: ¶¶4-6)

Craftily, Dhillon never says that anyone ever licensed the photo or that she was actually ever paid for the use of the photo. Dhillon, a highly sophisticated lawyer and experienced politician, carefully phrased her above statements to avoid any statements about any market for her photo. The fact that someone asked to “use” the photograph comes nowhere close, and she knows it. There simply is no evidence before this Court to demonstrate or even put in issue that there was a market for this photograph or that The Munger Games’ use of the photo with its “Meet Harmeeet” article had any effect whatsoever on the licensing of the photo. The statement that no one has asked to use the photograph since the “Meet Harmeeet” article is fanciful and irrelevant. If all of the prior requests were because of something that Dhillon initiated, such as her commencing a marketing campaign which led to the marketing company asking if it can use a photo as part of its work, then her statement is not relevant. Similarly, if she has a photo newer than the six-year old photograph involved in this case, and she is directing people to the new photograph, her statement is irrelevant.

Case law supports Doe 1 regarding this issue. As to the potential revenue to be generated by the licensing of the photograph in the future, the Second Circuit in *Swatch* properly warned

“While the loss of a potential yet untapped market can be cognizable under the fourth fair use factor, the potential market here is defined so narrowly that it begins to partake of circular reasoning. As Professor Nimmer has observed, “it is a given in every fair use case that plaintiff suffers a loss of a *potential* market if that potential is defined as the theoretical market for licensing the very use at bar.” 4 Nimmer on Copyright § 13.05[A][4]. To guard against this “vice of circular reasoning,” our case law limits our consideration to a use’s “impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets.” *Am. Geophysical Union*, 60 F.3d at 930–31.” (Emphasis original.)

Swatch, *supra*, 2014 WL 274407, *14. In Dash v. Mayweather, 731 F.3d 303 (4th Cir. 2013), the court granted summary judgment in favor of Mayweather because the plaintiff musical composer failed to demonstrate the “existence of a causal connection between the alleged infringement and some loss of anticipated revenue.” Id. at 313. In Mayweather, the boxer played plaintiff’s copyrighted music during his entrance into the arena at a fighting event. However, the plaintiff never established that there was any market for the music or that he ever received compensation for the work. He admitted that he had never sought to commercially exploit the work and he never

1 produced documents such as tax returns to prove that he made any money whatsoever from
 2 licensing the work. In his opposition to Mayweather's summary judgment motions, the plaintiff
 3 provided a report from a retained expert, Dr. Michael Einhorn, discussing the likely loss of revenue.
 4 The court rejected that report as being too speculative. Among other things, it did not expressly
 5 conclude that there was a market for the work and it suggested to the court that the expert was
 6 incapable of concluding that plaintiff would ever have been paid a licensing fee. Id. at 11.

7 Here, Dhillon has placed no limits on the hypothesized market for her six year old campaign
 8 photo. Similar to the court's statement in Swatch regarding defendant Bloomberg's publication of
 9 a portion of Swatch's corporate earnings conference for stock analysts, "it would strain credulity"
 10 to suggest that placing Dhillon's photograph next to an article about her and her political
 11 relationship with Charles Munger, Jr. affected the phantom value of the photo. Id. at *7. It could
 12 be argued that by utilizing the photo, Doe 1 simply expanded the audience that is now familiar with
 13 Dhillon.

14 Regardless of the financial impact Dhillon claims in this \$250 action, Doe 1's use of the
 15 photo had no effect whatsoever on Dhillon's ability to know and control precisely who saw the
 16 photo. First, the photo is instantly and easily available to anyone on the internet. Even if there is a
 17 cognizable interest in Dhillon's maintaining that control, it is far outweighed by the dissemination
 18 of important political news and commentary. Mattel, Inc. v. MGA Entm't, Inc., 705 F.3d 1108, 1111
 19 (9th Cir.2013) (the ultimate goal of the Copyright Act is to stimulate creativity for the general
 20 public good.) *See also, Stewart v. Abend*, 495 U.S. 207, 236 (1990) (the fair use doctrine was
 21 codified by Congress to prevent overzealous monopolists from using their copyrights to stamp out
 22 the very creativity that the Act seeks to ignite.)

23 Balancing the four statutory factors together, and weighing all disputed material facts, if
 24 any, in favor of Dhillon, this Court should conclude that the copyright law's goal of promoting the
 25 progress of science and useful arts would be better served by allowing Doe 1's use of the photo than
 26 by preventing it.

1 **V. DOE 1 IS ENTITLED TO HIS COSTS AND ATTORNEY'S FEES IN DEFENDING**
 2 **THIS PATENTLY FRIVOLOUS, POLITICALLY MOTIVATED SHAM ACTION.**

3 As previously established, Dhillon knew this action had no basis in copyright law when she
 4 filed it, yet she caused Doe 1 to incur significant expense in defending his Constitutional rights to
 5 free speech. Nothing in her opposition brief should dissuade this Court from these conclusions.
 6 Although Dhillon attempts to portray this lawsuit as an ordinary copyright infringement case, its
 7 existence and narrow agenda are well known and quite sinister. The suit has a single overriding
 8 purpose: to harass, bully and financially ruin political commentators who write critical articles on
 9 Charles Munger, Jr. and those hired by him to serve his will.

10 The judicial process should not be permitted to be used as a tool of the wealthy and
 11 powerful to discourage political discourse or hinder the dissemination of news about our public
 12 figures. Dhillon, who says she is a highly experienced trial lawyer and skilled politician, violated
 13 this fundamental tenet of American jurisprudence. She intentionally disregarded the law, bringing
 14 the instant action knowing that it was nothing more than a pretext for the bidding of Charles
 15 Munger, Jr. and his desire to squelch all those that oppose his views.

16 Section 505 of the Copyright Act states that the court may allow recovery of full costs and a
 17 reasonable attorney's fee to the prevailing party as part of the costs. 17 U.S.C. § 505. Dhillon's
 18 position throughout these proceedings has been objectively unreasonable and patently frivolous.
 19 She seeks to chill free speech and squelch all political commentary and criticism of her and her
 20 client. This Court should therefore award Doe 1 his attorney's fees and costs in the amount of
 21 \$128,665.00.⁶ *See, e.g., Maljack Prods. Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 890
 22 (9th Cir. 1996) (a fee award is appropriate where the losing party's legal or factual position is
 23 frivolous or objectively unreasonable.)

24
 25
 26 6 The fees and costs submitted are as of the filing of Doe 1's original moving papers. (Cigel Decl. at
 27 ¶ 16-19) Doe 1 should be permitted to update his request to reflect all fees and costs incurred
 28 through the granting of his motion and the entry of judgment thereon.

1 **VI. CONCLUSION**

2 For all the foregoing reasons, Doe 1 respectfully requests this Court to grant its motion for a
 3 judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) or in the alternative summary judgment
 4 pursuant to Fed. R. Civ. P. 56 and grant its requests for attorney's fees and costs.

5 **VII. EVIDENTIARY OBJECTIONS**

Material Objected To	Legal Authority
<p>Dhillon Declaration:</p> <p>From ¶3 that portion that reads, "I am informed and believe that the Registration Number is VA0001859929." The declarant lacks personal knowledge. The offered testimony is speculative.</p> <p>From ¶6 that portion that reads, "negative use". The declarant lacks personal knowledge. The offered testimony is speculative and improper argument.</p> <p>From ¶7 that portion that reads, "negative use" and "that has been tainted with a prior negative association will harm my public image. The declarant lacks personal knowledge. The offered testimony is speculative and improper argument.</p> <p>From ¶8 that portion that reads, "and the photograph was not altered in any way." The declarant lacks personal knowledge. The offered testimony is speculative and improper argument.</p> <p>All of ¶10 <u>except</u> the first sentence. The declarant lacks personal knowledge. The offered testimony is speculative and improper argument.</p> <p>The last sentence of ¶11. The offered testimony is hearsay. Best Evidence.</p>	<p>Lack of Foundation/Lack of Personal Knowledge (Fed. R. Evid. §602)</p> <p>Speculation/Improper Argument (Fed. R. Civ. Proc. 56(c)(4) (affidavit or declaration must be made on personal knowledge); <i>Soremekun v. Thrifty Payless, Inc.</i>, 509 F.3d 978, 984 (9th Cir. 2007) "[c]onclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment."))</p> <p>Best Evidence (Fed. R. Evid. § 1002)</p> <p>Hearsay (Fed. R. Evid. § 801)</p>
<p>Berg Declaration :</p> <p>All of ¶¶ 2 – 8, inclusive. Each of the cited paragraphs is irrelevant. Paragraphs 3, 4, 6, 7 & 8 contain improper speculation, argument or are not based upon the personal knowledge of the declarant. Additionally, ¶¶ 3, 4, 6, 7 & 8 contain improper expert testimony by a person not qualified as an expert.</p>	<p>Lack of Foundation/Lack of Personal Knowledge (Fed. R. Evid. §602)</p> <p>Speculation/Improper Argument (Fed. R. Civ. Proc. 56(c)(4); <i>Soremekun, supra.</i>, 509 F.3d at 984.)</p> <p>Relevancy (Fed. R. Evid. §§ 401 & 402)</p> <p>Improper Expert Opinion (Fed. R. Evid.</p>

	§§ 702 & 703)
Hussey Declaration: From ¶3 that portion that reads, "I am informed and believe was published on the website www.mungergames.net in February 2013." The declarant lacks personal knowledge. The offered testimony is speculative.	Lack of Foundation/Lack of Personal Knowledge (Fed. R. Evid. § 602) Speculation/Improper Argument (Fed. R. Civ. Proc. 56(c)(4))
Park Declaration: All of ¶¶ 2 – 10, inclusive. Each of the cited paragraphs is irrelevant. Paragraphs 3-10, inclusive, contain improper speculation, argument or are not based upon the personal knowledge of the declarant. Additionally, these paragraphs contain improper expert testimony by a person not qualified as an expert.	Lack of Foundation/Lack of Personal Knowledge (Fed. R. Evid. §602) Speculation/Improper Argument (Fed. R. Civ. Proc. 56(c)(4); <u>Soremekun</u> , <i>supra</i> ., 509 F.3d at 984.) Relevancy (Fed. R. Evid. §§ 401 & 402) Improper Expert Opinion (Fed. R. Evid. §§ 702 & 703)
Shoquist Declaration: Except for the first sentence of ¶2 and all of ¶6, all of ¶¶ 2-11, inclusive. Paragraphs 2, 3, 4 & 8 are irrelevant, contain speculation and offer impermissible argument. Paragraphs 5, 6, 7, 9, 10 & 11 are irrelevant and contain hearsay. Exhibits A, C, D, E, F, G, H & I: All of the referenced exhibits are irrelevant and contain hearsay. No proper foundation has been laid and the authenticity of each has not been established.	Relevancy (Fed. R. Evid. §§ 401 & 402) Speculation/Improper Argument (Fed. R. Civ. Proc. 56(c)(4); <u>Soremekun</u> , <i>supra</i> ., 509 F.3d at 984.) Lack of Foundation/Lack of Personal Knowledge (Fed. R. Evid. §602) Authenticity (Fed. R. Evid. § 901; <u>Beyene v. Coleman Sec. Servs., Inc.</u> , 854 F.2d 1179, 1182 (9th Cir.1988) (documents which have not had a proper foundation laid to authenticate them cannot support or defend against a motion for summary judgment. "A writing is not authenticated simply by attaching it to an affidavit....")) Hearsay (Fed. R. Evid. § 801)

Date: February 4, 2014

THE CIGEL LAW GROUP, P.C.

By: /s/
 Rick A. Cigel, Esq.
 Attorneys for Defendant
 DOE 1

1 PROOF OF SERVICE
2
3

4 UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
5

6 CASE NAME: **HARMEET K. DHILLON v. DOE 1**
7

8 The undersigned declares: I am a resident of the United States and am employed in the
9 City and County of Los Angeles, State of California; I am over the age of eighteen years and not a
10 party to the within action; my business address is 10866 Wilshire Boulevard, Suite 400, Los
11 Angeles, California 90024.
12

13 On February 4, 2014, I served the following document:
14

15 **DEFENDANT DOE 1'S REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT
16 ON THE PLEADINGS PURSUANT TO FRCP 12(C) OR IN THE ALTERNATIVE
17 SUMMARY JUDGMENT**

18 By serving in the manner described below to the interested parties herein and addressed to:
19

20 Harold P. Smith, Esq.
21 Krista L. Shoquist, Esq.
22 Dhillon & Smith, LLP
23 177 Post Street, Suite 700
24 San Francisco, CA 94108

25 **MAIL:** I caused such envelope(s) to be deposited in the mail at my business address, with
26 postage thereon fully prepaid, addressed to the addressee(s) designated. I am readily
27 familiar with the business practice of collecting and processing correspondence to be
28 deposited with the United States Postal Service on that same day in the ordinary course of
business.

FEDERAL: I declare that I am employed in the office of a member of the bar of this court
at whose direction the service was made.

29 Executed on February 4, 2014 at Los Angeles, California.
30

31 /s/
32 Shelly Lokietz
33
34
35
36
37
38